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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41284

BIOMIN, INC. v. CENTRAL TRANSPORT, INC.

Decided: January 8, 2001

This proceeding arises out of a billing dispute between Biomin, Inc. (Biomin or complainant) and Central Transport, Inc. (Central or defendant). Biomin is a manufacturer and marketer of certain clays used in the painting industry and various other endeavors. Central is a motor carrier authorized to conduct common and contract carrier operations in interstate commerce.[2] At issue are three shipments of clay products transported by Central between August 31, 1992, and March 9, 1993.

According to shipping documents and assertions made by the parties, the first shipment was transported by Central and another carrier from Biomin's facility at Huntington Woods, MI, to Laredo, TX, on August 31, 1992. Central assessed charges of $3,967.60 for this shipment in freight bill Pro No. 601-351899-0. Central acknowledges receipt of an $1,850.00 payment for this shipment reflected in Biomin check No. 1162 dated September 27, 1992, but notes that the check on its face refers to Pro No. 601-357009-0.

The second shipment was transported by Central and another carrier from the facilities of Bentec at Walled Lake, MI, to Laredo on September 10, 1992. Central assessed charges of $3,967.60 in freight bill Pro No. 601-357009-0. The freight bill identified Bentec as the shipper

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13710. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Department of Transportation records show that Central is currently operating under common and contract authority in MC-19311.

and party to be billed. Central acknowledges receipt of an $1,850.00 payment for this shipment reflected in Biomin check No. 1263 dated October 26, 1992.[3]

The third shipment was transported by Central and another carrier from the facilities of Centralia Coal Sales Co. (Centralia) at Wilkes Barre, PA, to Biomin c/o Wolverine Foundry in Walled Lake on March 9, 1993. Central assessed charges of $409.59 for this shipment in freight bill Pro No. 187-177916-4 and acknowledges receipt of full payment of the $409.59 assessed amount reflected in Biomin check No. 2563 dated October 23, 1993.

On February 23, 1994, Central instituted suit in the 43rd Judicial District Court of the State of Michigan to collect originally assessed unpaid freight charges allegedly due from Biomin for the three shipments at issue (Central Transport, Inc. v. Biomin, Inc., Case No. 94MHO 26756).

On July 5, 1994, Biomin filed a complaint before the ICC requesting the agency to determine that collection of the unpaid freight charges claimed by Central would be unlawful. Complainant raised issues of contract carriage, tariff applicability, rate reasonableness, estoppel, and fraud. Thereafter, by order dated August 23, 1994, the court dismissed the case before it without prejudice pending resolution by the ICC of the issues raised by complainant.

In a decision served October 26, 1994, the ICC established a procedural schedule for development of the record.[4] On December 23, 1994, complainant filed its opening statement. Central filed its reply on April 19, 1995, and Biomin submitted its rebuttal on June 9, 1995.

POSITION OF THE PARTIES

Complainant asserts that Central provided service to Biomin pursuant to a valid contract in its capacity as a contract carrier, that the tariff relied on by Central may be invalid and not applicable to the shipments at issue, and that the rate defendant seeks to assess is unreasonably high. Complainant specifically asserts that the shipment dated March 9, 1993 (freight bill Pro No. 187-177916-4) has been paid in full and that the shipment dated September 10, 1992, (freight bill Pro No. 601-357009-0) involves a consignor (Bentec) that is not a party to this proceeding.

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[3] The check on its face refers to Pro No. 601-357009-0.

[4] The ICC noted that Biomin's contentions regarding estoppel and fraud could not be used to defeat the claims for undercharges raised by Central. See Maislin Industries, U.S. v. Primary Steel, 497 U.S. 116 (1990) (Maislin).

Biomin supports its assertions with a verified statement from Mr. George Alther, complainant's President.[5] Mr. Alther asserts that he is in charge of Biomin's day-to-day operations, including the shipment of Biomin products. With respect to the shipment dated March 9, 1993 (freight bill Pro No. 187-177916-4), Mr. Alther states that the assessed freight charges have been paid and that Central has not made an undercharge claim for this shipment.

As to the shipment dated September 10, 1992 (freight bill Pro No. 601-357009-0), Mr. Alther notes that the named shipper/consignor is Bentec, a corporation separate and distinct from Biomin, and that Central has never billed Biomin for this movement. He asserts that the shipment was transported on behalf of Bentec and that Biomin is not liable or obligated to Central for the service provided. Mr. Alther states that Central filed a separate law suit against Bentec in the Circuit Court for the County of Oakland, State of Michigan (Case No. 94-471849), which was resolved by order of dismissal with prejudice dated June 6, 1994.[6]

Mr. Alther maintains that the only undercharge claim that Central could possibly assert against Biomin is that directed at the August 31, 1992 shipment (freight bill Pro No. 601-351899-0).[7] He states that, before arranging for movement of the shipment, he obtained from P.A.M. Transport Inc. (P.A.M.), an affiliate of Central, a quoted rate of $1,850.00 to transport Biomin's products from Huntington Woods to Laredo. The quoted rate was published by P.A.M. in a tariff issued September 14, 1992, effective September 16, 1992, attached as Exhibit 5 to Mr. Alther's statement. Mr. Alther states that he shared the rate quoted by P.A.M. with Roger Dillingham and Dean Parmenter, two Central sales representatives that called upon Biomin. According to Mr. Alther, Central's sales representatives indicated that they would match P.A.M.'s price. Relying on the representations of defendant's sales representatives, Mr. Alther asserts that he entered into a contract with Central to carry Biomin's products.

Mr. Alther indicates that the August 31, 1992 shipment was tendered to Central for transport and that Biomin paid Central the agreed-upon price of $1,850.00. Thereafter, Biomin received an invoice from Central assessing a charge of $3,967.60 for the shipment, an amount more than double the price quoted by P.A.M. and assertedly agreed to by Central. Mr. Alther states further that he obtained a verbal quote from a trucking firm identified as "Overnight" of $2,200.00 and a written quote from Southwest Motor Transport, Inc. (Southwest), of $2,322.00 to transport Biomin's products from Huntington Woods to Laredo. The Southwest quote is dated March 31, 1994, and is attached to Mr. Alther's statement as Exhibit 10. Based on the quotes

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[5] Mr. Alther's verified statement was submitted in complainant's rebuttal statement.

[6] A copy of the order bearing the heading VOLUNTARY DISMISSAL is attached to Mr. Alther's verified statement as Exhibit 7.

[7] Throughout complainant's rebuttal statement the date of shipment is erroneously referred to as August 3, 1992.

received from other motor carriers, Mr. Alther contends that defendant's $3,967.60 rate is unreasonable.

Mr. Alther further argues that the tariff relied upon by Central for the August 31, 1992 shipment is inapplicable. Defendant has failed to indicate that the $3,967.60 rate is the lowest applicable rate to be found in Central's tariffs or that defendant has diligently searched for an alternative tariff that would result in a lower rate.

Mr. Alther states that he entered into written contracts with Central to ship Biomin products to Raleigh, NC, and several other locations including Laredo. He maintains that Biomin would have continued to use Central to transport its products, but that its business was transferred to other trucking companies after Central attempted to assess charges that exceeded agreed-to levels.

In reply, Central maintains that the transportation services at issue were provided pursuant to its common carrier authority; that the defendant was a participant in the tariffs used to set its rates; that the tariffs relied upon are applicable to the shipment at issue; and that the rate assessed has not been shown to be unreasonable. It further states that this proceeding does not involve an undercharge issue in that defendant did not originally bill complainant at a lower rate and then attempt to rebill at a higher rate. Rather, Central maintains that it initially billed and seeks to collect full payment of the tariff rate due for the shipments at issue.

Central supports its arguments with verified statements from George Batty, its National Account Pricing Manager, and Roger Dillingham, a Customer Service Representative for defendant. Mr. Batty states that he oversees much of Central's tariff activity. He asserts that Central publishes a tariff of its own and that at all relevant times Central has been a full participant in tariffs published by the National Motor Freight Traffic Association, Inc., and Middlewest Motor Freight Bureau, Inc. According to Mr. Batty, the freight charges assessed for the shipments from Huntington Woods and Walled Lake to Laredo were based on a class 50 commodity classification for clay NOI, Item No. 48160 of National Motor Freight Classification NMFC 100-S, effective May 30, 1992, and the Middlewest Motor Freight Bureau Tariff 550E and Supplement 17 thereto, effective February 27, 1992, with a rate base of 21532. Mr. Batty states that Central initially billed Biomin $3,967.60 for the Huntington Woods shipment (Pro No. 601-351899-0) but received payment of only $1,850.00 from Biomin. With regard to the Walled Lake shipment (Pro No. 601-357009-0), Mr. Batty notes that, although the shipping order[8] listed Bentec as the consignor, it also listed Biomin as the shipper. He states that Central initially

[8] The shipping order is one of three documents submitted on the record that relate to this shipment. See Defendant's production of "Vertex "documentation- Shipment 2 and Exhibit 9 to complainant's rebuttal. The other two documents, the delivery receipt and a past due freight bill, identify Bentec as the shipper.

billed $3,967.60 to Bentec, a sister company of Biomin,[9] but received payment of only $1,850.00 from Biomin.

Mr. Batty describes the tariff basis for the assessed rate and discount applied for the March 9, 1993 shipment from Wilkes Barre to Walled Lake. He acknowledges that the $409.50 charge assessed by Central was paid by Biomin and that nothing is due and owing for this shipment. Mr. Batty also maintains that the charges assessed by Central for the shipments at issue were based on the lowest applicable tariff rates filed and in effect at the time of shipment, that the rates contained in the tariffs are reasonable, that Central's sales representatives are not authorized to match prices of any other motor carrier, and that Central at no time had any oral or written contract with Biomin or Bentec relating to the shipments at issue.

Mr. Dillingham asserts that he was never advised by Mr. Alther that Biomin had obtained a quote from P.A.M. to transport shipments from Michigan points to Laredo for $1,800 [sic], nor did he ever agree on behalf of Central to provide such service at such a rate. He states that he did not enter into a contract with Biomin on behalf of Central. He further states that, as a matter of company policy, Customer Service Representatives are instructed not to match prices of affiliated companies and that he is unaware of any time when any sales representative of Central agreed to match a rate by P.A.M. or another Central affiliate.

DISCUSSION AND CONCLUSIONS

Because each shipment raises different issues, we will address each one separately. To summarize our conclusions, (a) there is no dispute as to the March 9 shipment; (b) Biomin has not been shown to be responsible for charges on the September 10 shipment; and (c) Biomin has not, on this record, shown that the charges sought on the August 31 shipment are not due.

A. The March 9 Shipment.

Neither party questions the defendant's billing as to the March 9, 1993 shipment, and both agree that the charges originally assessed by Central were paid in full by Biomin. Because the shipment is not in dispute and no issue requiring Board resolution has been raised, we will dismiss all aspects of this proceeding relating to the March 9, 1993 shipment.

[9] The statement "Central initially billed Biomin, a sister company of Biomin" quoted from page 4 of the Batty statement contains an obvious typographical error that we have corrected by substituting Bentec for the initial reference to Biomin.

B. The September 10 Shipment.

Freight bill Pro No. 601-357009-0 applies to the September 10, 1992 shipment from the facilities of Bentec at Walled Lake to Laredo. The freight bill identifies Bentec, a corporate entity related to but separate and distinct from Biomin, as the shipper and party to be billed. Bentec is also identified as the shipper/consignor in the shipping order and delivery receipt. Although Biomin is also named in the shipping order and checks issued by Biomin make reference to Pro No. 601-357009-0,[10] Central has never billed Biomin for this movement. Central has provided no basis for determining how Biomin is responsible or obligated to defendant for a shipment transported on behalf of Bentec. Because the consignor named by Central in freight bill Pro No. 601-357009-0 (Bentec) is a non-party to this proceeding, the billing dispute relating to this shipment is not properly before us and will be dismissed.

C. The August 31 Shipment.

The only matter that is properly before us is the validity of Central's claim that Biomin should have paid $3,967.60 instead of $1,850.00 for the August 31 shipment. Although it may well be that the rate that Central seeks to collect is outside of the market-based range of rates that typically moved traffic such as this, Biomin has not, on this record, shown the rate to be unlawful.

1. Common vs. Contract Carriage. One way in which Biomin could avoid paying the rate in the tariff would be by showing that the shipment was handled in contract carriage. Even though the ICC Termination Act eliminated the distinction between common and contract carriers, new section 13710(b) gives the Board jurisdiction to resolve disputes as to whether transportation service performed by an authorized carrier prior to January 1, 1996, was provided in its common carrier or contract carrier capacity.

Common carriers, which offered for-hire transportation to the general shipping public,[11] were historically required to file public tariffs and charge only those rates contained in the filed tariffs, unless that rate was set aside by the ICC as unreasonable or otherwise unlawful. See Maislin, 497 U.S. at 127. The rates of contract carriers, by contrast, were historically set and maintained privately. They could be lower (or higher) than a carrier's common carrier rates, and were exempt from the filed rate doctrine. 49 U.S.C. 10761(b), 10762(f). See Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. 150 (1983), aff'd sub nom., Central & S. Motor Freight Tariff Ass'n. v. United States, 757 F.2d 301 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985).

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[10] Nothing in the record provides an explanation for this anomaly.

[11] See 49 U.S.C. 10102(14); Regular Common Carrier Conf. v. United States, 803 F.2d 1186, 1187-88 (D.C. Cir. 1986).

Contract carriers provided transportation services for shippers under continuing agreements by: (1) assigning vehicles for a continuing period of time for the exclusive use of such shippers, or (2) providing transportation services designed to meet the distinct needs of the shippers. 49 U.S.C. 10102(16).[12] See Aero Mayflower Transit v. ICC, 711 F.2d 224, 226-27 (D.C. Cir. 1983); Ford Motor Co. v. Security Services f/k/a Riss Intl., 9 I.C.C.2d 892, 910 (1993). To conclude that particular transportation services were provided in contract carriage, we must find that: (1) the carrier held appropriate contract carrier authority to provide the service; (2) the shipper and the carrier had an agreement for the transportation to be provided as contract carriage and the shipments moved under that agreement; and (3) the transportation was consistent with the statutory definition of contract carriage, i.e., (a) it moved under a continuing agreement, or (b) the carrier met the distinct needs of the shipper.[13] See Freightliner Corp. & Mercedes-Benz Truck Co.,-Rates, 9 I.C.C.2d 1031, 1040 (1993) , aff'd sub nom. In re Transcon Lines, 89 F.3d 559, 567 (9th Cir. 1996) (Transcon). In resolving disputes concerning whether particular services were common or contract carriage, the "totality of the circumstances" is examined, General Mills, Inc.—Petition for Declaratory Order, 8 I.C.C.2d 313, 322-23 (1992), aff'd, Bankruptcy Estate of United Shipping Co. v. General Mills, 34 F.3d 1383 (8th Cir. 1994), taking into account the parties' negotiations, their intention, the agreements, and their performance under the agreements. Transcon, 89 F.3d at 566.

As indicated above, Central does hold contract carrier authority. The evidence submitted, however, does not indicate that any of the other factors are present to support a finding that the service performed by Central was contract carriage. Mr. Alther makes reference to certain agreements relating to the movement of other types of traffic. The record contains no documentary evidence relating to such movements and provides no substantive basis for concluding that the shipments referred to were contract carrier movements. Further, Mr. Alther offers no explanation that would link the agreements to which he refers to the shipment at issue. There is nothing in the shipping orders and freight bills of record to suggest that contract carrier movements were contemplated. Nor is there any evidence of the existence of an agreement between the parties under which Central was to provide contract carrier service to Biomin. The record is devoid of any evidence indicating that shipments moved under a continuing agreement or that Central was meeting the distinct needs of Biomin. We conclude that the transportation service rendered by Central on behalf of Biomin was that of a common carrier.

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[12] We note that the Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673, enacted on August 26, 1994, renumbered former paragraphs 10102(13), (14), and (15) as 10102(14), (15), and (16).

[13] Under section 10102(16), the distinct need test need not be met if the carrier "assign[ed] motor vehicles for a continuing period of time for the exclusive use of" that shipper. However, there is no assertion that this dedicated equipment test was met here.

2. Tariff Applicability. Another way in which Biomin could avoid paying the rate that Central seeks is by showing that the rate does not "apply" under the terms of the governing tariffs. Biomin's claims that the tariffs relied on by Central were invalid or inapplicable, however, are not supported by the facts of record. Central has established that it is a participant in the tariffs on which its assessed charges are based and that the tariffs were properly filed and published, and it maintains that the tariffs relied upon provide for the lowest applicable rates. Biomin claims that Central tariffs provide for applicable rates lower than the $3,967.60 assessed by defendant, but provides no support for its contention. Under these circumstances, we agree with Central that the tariffs it cited to support its freight charges were valid and applicable to the shipment at issue.

3. Rate Reasonableness. Finally, Biomin could avoid paying the rate that Central seeks by showing that it is unreasonably high. The standards for judging the reasonableness of motor carrier rates were discussed and established in Georgia-Pacific Corp--Pet. for Declar. Order, 9 I.C.C.2d 103 (1992) (GPac-I), reconsidered, 9 I.C.C.2d 796 (1993) (GPac-II), applied, 9 I.C.C.2d 1052 (collectively, Georgia Pacific), aff'd sub nom., Oneida Motor Freight, Inc. v. I.C.C., 45 F.3d 503 (D.C. Cir. 1995) (Oneida). Under the Georgia-Pacific standards, we determine the reasonableness of a rate by comparing it with a "market-based cluster of price/service alternatives for the issue traffic," or, in other words, rates "at which a shipper was willing to ship and a carrier was willing to transport the goods." GPac-I, at 156; GPac-II at 806-09. If it is established that a challenged rate is "significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) at issue, [i.e., that the contested rate would not have moved the traffic had it been quoted at the time, then] the challenged rate will be deemed unreasonable." GPac-I at 156-57; GPac-II at 806-09. As noted in GPac-I, determining rate reasonableness requires consideration of "contemporaneous rate offers from other carriers to move the traffic at issue, . . . [and] rates for other shipments by the shipper under substantially similar transportation conditions (similar commodity, distance moved, volume, etc.) that moved at about the same time. . . ." GPac-I at 157.

It may well be that the rate sought by Central exceeds the market-based cluster of price/service alternatives that would have moved this traffic at the time of shipment, but Biomin has not made a sufficient showing on this record. The only evidence submitted by Biomin of comparable rates are the rate quotes it says it obtained from P.A.M., "Overnight," and Southwest. While the rates quoted are significantly below the tariff rate assessed by Central, they are not sufficient to demonstrate, under Georgia-Pacific, that the rate that Central seeks to charge is unreasonable. The P.A.M. rate — which is well below the rate that Central now seeks — was discussed at the time of shipment, but did not take effect until September 16, 1992, more than two weeks after the shipment at issue was transported; but even if it is considered contemporaneous, standing alone, it does not constitute a cluster of market-based rates. The "Overnight" quote was orally obtained at some undesignated time and has not been further substantiated. The Southwest rate quote was dated March 31, 1994, and clearly can not be viewed as contemporaneous. The rate quotes submitted by Biomin thus are not sufficient to allow for recognition of a market cluster level of rates in existence at the time the August 31,

1992 shipment occurred. It may be that Biomin could, with additional evidence of contemporaneous rates being offered and assessed by other motor carriers, demonstrate that Central's applicable tariff rate for the shipment exceeded a market-based cluster of rates being charged at the time, but Biomin has not made that demonstration on this record. Lacking such evidence or such a showing, we cannot find the rate applied by Central to be unreasonable.

Accordingly, as to the August 31, 1992 shipment we find that: (1) Central performed common carrier service for Biomin and was required to charge published tariff rates; (2) the rate assessed was properly based on Central's published tariffs; and (3) the assessed rate has not been shown to be unreasonable.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is dismissed.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable James R. Hand
District Court, 43rd Judicial District
200 West 13 Mile Road
Madison Heights, MI 48071

Re: Case No. 94MHU026756

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary